1997

A.K. & R. Whipple Plumbing and Heating v. Thomas D. Guy and Aspen Construction, a Utah corporation : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

A.K. & R. WHIPPLE PLUMBING AND HEATING,	*	Priority No. 15
Plaintiff/Appellee,	*	No. 970580-CA
vs.	*	Trial Court Cases:
	*	940300014CN
THOMAS D. GUY and ASPEN CONSTRUCTION, a Utah corporation,	*	940000012CV
	*	940000013CV
	*	(consolidated)
Defendants/Appellant.	*	

BRIEF OF APPELLANT

Appeal from an Order of the
Third Judicial District Court
Summit County, Utah
The Honorable Frank G. Noel, Presiding

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LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the District Court:

1. A.K. & R. Whipple Plumbing and Heating, Plaintiff/Appellee, represented by Steven Wall of WALL & WALL, Salt Lake City, Utah.

2. Aspen Construction, Inc., a Utah corporation, Defendant/Appellant, represented by Joseph M. Chambers of HARRIS, PRESTON & CHAMBERS, Logan, Utah. Thomas D. Guy (940300014CN - District Court), Diane Quinn (940000013CV - Circuit Court), and Thomas D. Guy and Claire B. Guy (940000012CV - Circuit Court) are the respective property owners and did not appear. The latter two Circuit Court cases were consolidated into the District Court proceeding for trial.

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5. Defendant's Motion to Dismiss Filed January 1995;

   Affidavit of Lynn Padan (in Support of Motion to Dismiss);

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7. Plaintiff's Exhibit 12

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JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. §78-2-2(3)(j) and Utah R. App. P. Rules 3 and 4.

ISSUES PRESENTED FOR REVIEW

ISSUE #1: Where the undisputed evidence established the Plaintiff A.K. & R. Whipple Plumbing and Heating (hereinafter "Whipple Plumbing") did not possess the requisite HVAC (furnace) contractor's license, did the trial court commit error in failing to strictly apply §58-55-604 U.C.A. and allowed Whipple Plumbing to obtain recovery for defective HVAC (furnace) work?

STANDARD OF REVIEW: "The interpretation of a statute poses a question of law which this court reviews for correctness and without deference to the lower court's conclusions." Zoll and Branch, P.C. v. Asay, 932 P.2d 592, 593 (Utah 1997).

CITATION TO RECORD WHERE ISSUE PRESERVED: Defendant's Final Memorandum in Support of its Motion to Dismiss, Record pp. 76-97; Appellant's Docketing Statement page 7.

ISSUE #2: Did the trial court commit error when it granted the Plaintiff's Motion to Reopen on the grounds of "in the interest of justice" and then allowed the Plaintiff to introduce evidence regarding the mechanics' lien and attorney fees which was not presented at trial, through testimony of witnesses that were never identified in discovery or in the Court's Scheduling Order?

STANDARD OF REVIEW: The trial court's decision to grant or deny a motion for a new trial will generally not be reversed absent an abuse of discretion. Rasmussen v. Sharapata, 895 P.2d 391, 396 (Utah App. 1995). However, if the court's ruling is based upon a conclusion of law, the decision will be reviewed for correctness. Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993); Horrell v. Utah Farm Bureau Ins. Co., 909 P.2d 1279, 1280 (Utah App. 1996).

CITATION TO RECORD WHERE ISSUE PRESERVED: Defendant Aspen's Reply to Plaintiff's Motion to Reopen and Counter Motion, Record 353; Defendant's Reply to Plaintiff's Amended Motion to Reopen, Record 369; Defendant's Final Reply, Record 400; and Reporter's Transcript of April 18, 1996, Hearing, pp. 15-24, 30-31.

ISSUE #3: Did the trial court commit error when it determined that the Plaintiff had met its burden of proof of establishing compliance with the statutory elements necessary to obtain foreclosure of the three (3) mechanics' lien?

STANDARD OF REVIEW: This issue raises a mixed factual and legal determination. To the extent this court is reviewing a factual determination, the standard of review is "clearly erroneous" State v. Pena, 869 P.2d 932, 936-937 (Utah 1994). To the extent this issue presents a legal determination, the standard is one of "correctness" with no particular deference to trial court's determination. State v. Pena, supra, p. 936-937; Zoll & Branch, supra, p. 593.

CITATION TO RECORD WHERE ISSUE PRESERVED: Defendant's Response to Plaintiff's Objections to Findings of Fact and Conclusions of Law, Record 291; Defendant's Objection to Plaintiff's Proposed Findings of Fact and Conclusions of Law, Record 309; Letter to Judge Noel dated January 4, 1996, Record 289; Transcript of Hearings February 15, 1996, pp. 7-35 and April 18, 1996, pp. 12-22; See also Minute Entry of November 30, 1995, which notes Defendant's objection made during closing argument (second paragraph), Record 262.

ISSUE #4: Did the trial court commit error when it awarded Whipple Plumbing's attorney fees and denied Aspen's request for attorney fees, particularly in light of Judge Brian's pretrial ruling in favor of the Defendant dismissing the Plaintiff's statutory lien foreclosure action as to the defective furnace (HVAC) work Whipple performed?

STANDARD OF REVIEW: The issue of attorney fees raised in the context of this case presents a mixed question of law (interpretation of statute granting award of attorney fees) and fact (reasonableness - calculation of award) and sufficiency of the evidentiary basis of the award.

As to the interpretation of the statute, the standard of review is one of correctness without deference to the lower court. Zoll & Branch, supra p. 593.

As to the reasonableness or calculation of the award, the Utah courts have consistently held that "[c]alculation of reasonable attorney fees is in the sound discretion of the trial court, and will not be overturned in the absence of a showing of a clear abuse of discretion." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). However, the Utah Supreme Court has also held that an evidentiary basis is a fundamental requirement for establishing an award and without an adequate evidentiary basis the award constitutes an abuse of discretion and must be overruled. Paul Mueller Co. v. Cache Valley Dairy Assn., 657 P.2d 1279 (Utah 1982); Utah Production Credit Assn. v. Cox, 627 P.2d 62 (Utah 1981).

CITATION TO RECORD WHERE ISSUE PRESERVED: Reporter's Transcript of Hearings of February 15, 1996, pp. 7-31 and September 17, 1996, pp. 31-39, particularly p. 33; Reply to Plaintiff's Motion to Reopen and Counter Motion, Record 353; Defendant's Reply to Plaintiff's Amended Motion to Reopen, Record 369.

ISSUE #5: Did the trial court during the trial commit reversible error:

a. In failing to grant Defendant's Motion to Dismiss and in the Alternative Motion in Limine when the Plaintiff failed to comply with Judge Brian's pretrial order from the hearing of May 8, 1995, as well as the trial court's Scheduling Order and notwithstanding allowed the Plaintiff to proceed to trial without timely designating its witnesses as required in the Scheduling Order?

b. When it allowed Mr. Ken Whipple to testify as an HVAC expert witness during the second phase of the trial, particularly when Mr. Ken Whipple was never designated as an HVAC expert witness, nor qualified as an HVAC expert at the outset of the trial? (The trial was interrupted and occurred over a two month period allowing Mr. Ken Whipple who was not HVAC licensed when trial began in October to eventually obtain an HVAC contractor's license and testify as such in the November proceedings.)

c. When it failed to allow rebuttal testimony by the Defendant's expert witnesses as to the defective heating system?

STANDARD OF REVIEW: Trial courts are granted broad discretion in admitting or excluding evidence. State v. Pena, 869 P.2d 932, 938 (Utah 1994). However, applying a specific standard of review for evidentiary rulings has proven problematic given the necessary analysis of factual issues, legal issues, and a mixture of both. See Hansen v. Heath, 852 P.2d 977, 978 (Utah 1993). A decision whether or not to admit evidence is often the "sum of several rulings, each of which may be reviewed under a separate standard." State v. Thurman, 846 P.2d 1256, 1270 n. 11 (Utah 1993); Trolley Square Associates v. Nielson, 886 P.2d 61 (Utah App. 1994).

CITATION TO RECORD WHERE ISSUE PRESERVED:

a. Denial of Motion in Limine: Trial transcript pp. 3-20; Defendant's Motion to Dismiss and in Alternative Motion in Limine, Record 122-166.

b. Improperly Allowing Ken Whipple to testify as an HVAC expert: Transcript of trial proceedings p. 852.

c. Improperly limiting Rebuttal Testimony: Transcript of trial proceedings pp. 978-988 particularly p. 984.

APPLICABLE STATUTES AND RULE

Utah Code §38-1-7:

(1) A person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days from the date:

(a) the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38-11-102; or

(b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

(2) This notice shall contain a statement setting forth:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the equipment or material;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent and an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents. No acknowledgment or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

Utah Code Ann. §58-55-604:

No contractor may act as agent or commence or maintain any action in any court of the state for collection of compensation for performing any act for

which a license is required by this chapter without alleging and proving that he was a properly licensed contractor when the contract sued upon was entered into, and when the alleged cause of action arose.

Rule 59 U.R.C.P.:

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be provided by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which

it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.
(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

A. NATURE OF THE CASE: This appeal is from a judgment of the Third District Court, Summit County, which entered judgment ordering foreclosure of three (3) mechanics' liens filed by the Plaintiff after offsetting the lien claim by amounts the Defendant Aspen sought as damages in its counterclaim.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW: The Plaintiff Whipple Plumbing filed three (3) separate lawsuits in Summit County to foreclose mechanics' liens on three (3) different parcels of property. The cases were later consolidated for purposes of trial. (Record 24) In a pretrial motion, the Defendant Aspen Construction asked the lower court to dismiss the HVAC (heating, venting and air conditioning) portion of Whipple's lien claim on the basis that Whipple lacked proper licensure and therefore under Section 58-55-604 U.C.A. lacked standing to maintain any action for compensation for such work. (Record 76-97)[1] Judge Brian ruled on the Motion at a hearing held May 8, 1995, granting Aspen's Motion to Dismiss which was later reduced to a written Order entered July 17, 1995. (Record 100, 113-116) The Order of Dismissal required Whipple to take actions to correct the heating system by July 15, 1995. This was never accomplished. (Record 113-116, 255-261) A complete copy of Judge Brian's order is set forth in Appendix 2.

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[1] *For some unknown reason, the Defendant's Motion to Dismiss, Affidavit of Lynn Padan in Support of Aspen's Motion to Dismiss, and Memorandum in Support of Defendant's Motion to Dismiss are missing from the District Court files. These documents are included in addendum 5.*

On June 19, 1995, the trial court set the matter for trial for two (2) days in October 1995, and established a Scheduling Order requiring, among other things, that the Plaintiff Whipple disclose its witnesses including experts by August 1, 1995.[2] (Record 101, paragraph 11) In late July 1995, Aspen submitted discovery to Whipple to prevent any last minute surprise. (Record 134)

Whipple failed to comply with the Scheduling Order or answer the discovery propounded by Aspen, and prior to the final pretrial held on September 25, 1995, Aspen filed a Motion to Dismiss (as sanctions) and in the Alternative a Motion in Limine. (Record 122-166) The trial court denied Aspen's Motion and allowed Whipple to proceed to trial. (Unrecorded pretrial conference of September 25, 1995; Motion renewed at trial for record. See Transcript Vol. 1, pp. 15-21.)

The trial occurred over 4 1/2 days - October 11 - 12, and November 28, 29, and 30, 1995, during which the court took evidence of the work which Whipple claimed to have provided to the three (3) separate properties. The Plaintiff sought recovery identifying eleven (11) separate claims:[3]

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[2] *The Scheduling Order also required the Defendant Aspen to disclose its witnesses including experts by August 15, 1995, Record 101, paragraph 11.*

[3] *Exhibit 12 included as Addendum 7.*

Reference	*Amount*
1. Sewer Laterals	*$10,200.00*
2. Thomas Guy Pool house	*$1,665.92*
3. Diane Quinn Sump Pump	*$1,100.00*
4. Municipal Water Line Re-location	*$6,660.80*
5. French Drains 77 Thaynes	*$3,162.05*
6. Backhoe 77 Thaynes Canyon Dr.	*$780.00*
7. Pool House Miscellaneous	*$65.00*
8. Diane Quinn Gas Line	*$631.00*
9. 77 Thaynes House Plumbing	*$13,358.00*
10. 77 Thaynes House Heating	*$12,265.50*
11. 77 Thaynes House Gas Piping	*$1,015.00*

Aspen pursued its counterclaim seeking damages for the defective heating system and disputed the value of some but not all the work Whipple Plumbing claimed to have performed. During the first 2 days of trial in October, the Plaintiff's witnesses primarily testified as to the work performed by Whipple Plumbing. The trial did not conclude as scheduled and it was continued until November 28, 1995. (Record 253) During this interim period of time, Mr. Ken Whipple obtained his HVAC contractor's license. Over the objections of Aspen's counsel, the court allowed Mr. Ken Whipple to then testify as an HVAC expert witness refuting Aspen's expert, Mr. Anthony Neeley, who had testified in the October proceedings about the heating systems defects and the costs to repair the defects. No notice was ever given to Aspen or its counsel that the Plaintiff intended to call Mr. Ken Whipple to testify as an HVAC expert witness. (Record 214-218) During the November phase of the trial, Aspen attempted to introduce rebuttal testimony of a mechanical engineer, Mr. Fred Nash, to refute Ken Whipple's testimony. (This was after Mr. Ken Whipple was allowed to testify as an HVAC expert.) The court ruled that because Aspen had not identified Mr. Fred Nash as an expert witness it would not allow him to testify as to certain defects of the heating system, even as a rebuttal witness. (Some testimony was allowed but to a good portion the testimony which Aspen sought as rebuttal was not allowed.) (Trial transcript 978-988)

During closing arguments on November 30, 1995, Aspen's counsel noted, among other things, that there was no evidence admitted of any written "Notice of Lien Claim" as required by the statute, no evidence showing timely filing under §38-1-7 or timely enforcement as required under §38-1-11 U.C.A., no adequate property description(s), no

evidence of record regarding the written notice of lien claim containing the requisite statutory elements nor any evidence establishing the Plaintiff's work fell within the protection of the mechanics' lien statute, the dates services were first and last provided, the purported owners and/or record owners of the property, the property description[4], the person who requested the services, and no evidence of compliance with the statutory mailing requirement which is prerequisite to an award of attorney fees. §38-1-7(3) U.C.A. The trial court appeared angered that these defects were not pointed out earlier by the Defendant's attorney, particularly after 4 1/2 days of trial. (Record 262, second paragraph.)

On November 30, 1995, the court entered a Minute Entry (memorandum decision) which granted a judgment of approximately $3,900.00[5] in favor of Whipple. The Minute Entry indicated that each party was to bear their own attorney's fees. (Record 262-264) In the Minute Entry, the trial court requested Aspen's attorney to prepare the Findings of Fact & Conclusions of Law and Judgment. No order of foreclosure was indicated. (Record 262-264) A complete copy of the trial court's written decision - Minute Entry is included as Addendum 3.

Aspen's counsel prepared a monetary judgment in favor of Whipple along with proposed Findings of Fact & Conclusions of Law. Relying upon the written Minute Entry detailing the judge's thoughts and conclusions with respect to the case, the Defendant Aspen did <u>not</u> prepare any specific Findings or Conclusions specifying foreclosure of the three (3)

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[4] *For example, Exhibit 3 only identifies Tom Guy's pool house, Deervally (sic) and Exhibit 5 Jeremy Ranch, Park City.*

[5] *The trial court appeared to have made a $7,000.00 error in Aspen's favor which in good conscious Aspen has never really disputed - sewer laterals $7,000.00 + $3,200.00 = $10,200.00; court granted only the $3,200 portion. (Aspen has disputed that the $3,200.00 claim should have been granted, but not the math error - see discussion beginning page 36.)*

liens or any order of foreclosure as the Court did not order such and also because there was no property description or other information in the trial record which counsel could include in such an order. (Record 436-449 submitted December 15, 1995.)

Whipple's counsel objected to Aspen's proposed Findings, Conclusions, and Judgment and prepared its separate Findings of Facts, Conclusions of Law, and Order of Foreclosure. (Record 277-284) The Defendant Aspen objected to Whipple's proposed Findings/ Conclusions pointing out several deficiencies contained therein and the lack of any evidence in the record to support any foreclosure order. (Record 309-315); see also Transcript of February 15, 1996 hearing pp. 7-33.

Whipple then filed a Motion to Reopen the case to take additional evidence and prior to the court ruling upon that motion filed an amended Motion to Reopen. (Record 334 and 362.) The Defendant Aspen opposed both Motions. (Record 353 and 369.) The court granted Whipple's Motion and allowed the Plaintiff Whipple to reopen its case-in-chief for the purpose of putting on evidence of the mechanics' liens stating that it was doing so "in the interest of justice". (Reporter's Transcript of April 18, 1996. Hearing, p. 23; Record 1731.) Aspen's counsel requested the trial court to clarify for the record the exact grounds under Rule 59 U.R.C.P. on which it was ordering the case to be reopened and the court restated that it was doing so in the "interest of justice." (Transcript of April 18, 1996, hearing, p. 31; Record 1739.)

Subsequently on September 19, 1996, the court held a further evidentiary hearing and over Aspen's objections took further evidence of the mechanics' liens and also took under

advisement Whipple's request for reconsideration for an award of attorney's fees.[6] Whipple Plumbing asserted that now having "prevailed" it was entitled to attorney fees as the "prevailing party." (Record 411-419) The Defendant Aspen had requested a portion of its attorney fees be awarded since it prevailed against Whipple on Whipple's mechanics' lien claim for the defective HVAC work. (Transcript p. 621 - Record 1283) The trial court refused to award attorney fees to the Defendant Aspen and then awarded Whipple attorney fees in the amount of $7,500.00. (Minute Entry dated December 5, 1996, Record 420.)

Aspen asked the trial court for additional time to submit formal objections to Whipple's latest version of proposed Findings of Fact and Conclusions of Law and Order of Foreclosure (third set) prepared pursuant to the court's December 5, 1996, Minute Entry. On March 31, 1997, the trial court denied Aspen's Motion and at the same time signed Whipple's proposed Findings of Fact and Conclusions of Law, and Order.[7] These documents were filed with the Summit Court Clerk on April 7, 1997. (Record 500, 513) Aspen filed its Notice of Appeal with the Summit County District court on April 29, 1997. (Record 523)

OVERVIEW OF FACTS

Whipple Plumbing through its employee Bill Fenstermaker, Bidder/Manager, contracted with Aspen Construction to perform sewer line work, rough/finish plumbing, and HVAC work:

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[6] *At the September 1996 hearing, the trial court allowed testimony from Kelly Cassell who was never identified in the answers to discovery (Record 213) and following the testimony admitted noncertified copies of the liens. (Record 1757)*

[7] *It was evident that the trial court had grown weary of the prolonged post trial proceedings which had drawn out for over 15 months, however, because of the trial court's impatience it is respectfully submitted that conclusion 5 (Record 510) is contrary to Judge Brian's ruling in that it allows Whipple to foreclose a lien which includes HVAC work. There may also be duplication of costs as well, however, because the trial court denied Aspen's motion for additional time to submit formal objections and immediately signed them Aspen did not have an opportunity to have the trial court to correct these errors.*

sewer lateral contract 6[8]-- Exhibit #1 ---------- $7,000.00

rough plumbing contract -- Exhibit #2 ---------- $13,000.00

HVAC-Furnace contract -- Exhibit #19 ---------- $11,775.00

Whipple Plumbing discovered Fenstermaker had embezzled/stolen from it and terminated and prosecuted Fenstermaker. Whipple then contacted Aspen and primarily through Aspen's records determined that Fenstermaker (both personally and on behalf of Whipple Plumbing) had been doing other work for Aspen. Whipple prepared invoices for the other work it believed it was entitled to be compensated for. These included:

sewer laterals (curb to house) -- Exhibit #2 ---------- (but see Exhibit #24 only $2,200.00)	$ 3,200.00
Tom Guy Pool house -- Exhibit #3 ----------	1,165.92
install trash compactor -- Exhibit #4 ----------	1,100.00
gas line -- Jeremy Ranch -- Exhibit #5 ----------	631.00
municipal water line relocation -- Exhibit #12 -------- Job 4 (but see Exhibit #23 only $1,300.00)	6,660.80
backhoe usage -- Exhibit #8 (at trial only claim ------ for $780 pursued) (see Exhibit #12, Job 6)	3,199.17
French drains -- Exhibit #12, Job 5 ----------	3,162.05
pool house misc. -- Exhibit #12, Job 7 ----------	65.00
extras on HVAC contract bringing total to ----------	12,265.00
extras on finish plumbing contract bringing total to -	13,358.00

[8] *Contract was found by trial court to cover only work from street to curb.*

Aspen and Whipple Plumbing's relations deteriorated primarily over the HVAC contract and as well as a belief held by Ken Whipple that Aspen and Fenstermaker had conspired to obtain work from Whipple without paying for it. Aspen disputed this and felt Whipple was gouging in its billing practices to recoup losses caused by Fenstermaker's dishonesty.

The parties stipulated at trial that three (3) payments totalling $17,000.00 had been made by Aspen to Whipple Plumbing. Whipple sought recovery from Aspen for $33,968.27 plus costs and attorney fees. Below is a chart that summarizes the various jobs Whipple sought recovery for along with the amount ordered by the trial court:

(Arranged by jobs references in Exhibit #12.)

Job	Description	Lien Amount	Court Ordered Recovery
1	Sewer Laterals	$10,200.00	$3,200.00**
2	T. Guy pool house	1,665.92	1,666.00
3	D. Quinn sump pump	1,100.00	.00
4	Municipal water relocate	6,660.80	.00
5	French drains	3,162.05	.00
6	Backhoe 77 Thaynes	780.00	100.00
7	Pool house misc.	65.00	.00
8	D. Quinn gas line	631.00	631.00
9	77 Thaynes plumbing	13,358.00	12,158.00
10	77 Thaynes heating	12,265.50	9,173.00
11	77 Thaynes gas piping	1,015.00	1,015.00
	Subtotal	$50,903.27	$27,943.00
	Aspen offset for corrections to furnace		- 7,000.00
	Less payments	$-17,000.00	$-17,000.00
	TOTAL	$33,903.27	$3,943.00

** Math error of $7,000.00 (see footnote 5 page 11)

(Record 262-264)

C. STATEMENT OF FACTS:

1. Aspen Construction Company (hereinafter "Aspen") is a corporation involved in the general contracting and building industry. Aspen holds a license as a general building contractor issued by the Utah Department of Business Regulations, Licensing and Contracting Division. (Transcript 451)

2. During the period of time this dispute arose, A.K. & R. Whipple Plumbing and Heating, Inc., (hereinafter sometimes "Whipple Plumbing") was a corporation engaged in plumbing and heating system installations possessing a general plumbing subcontractor's license. Whipple Plumbing does not hold an HVAC subcontractor's license. A general plumbing subcontractor's license (classification 210 - Record 91) allows the subcontractor to install only boiler heating systems. An HVAC specialty license is required to install forced air furnace systems and related sheetmetal ducting. (Record 113, Order of Judge Brian which became the "law of the case").

3. Ken Whipple is the president of a corporation known as A.K. & R. Whipple Plumbing and Heating, Inc. Whipple Plumbing is located in Salt Lake City, Utah. (Transcript 20)

4. Lynn Padan is the sole shareholder of Aspen Construction Company. Aspen is located in Salt Lake City, Utah. (Transcript 451)

5. In late 1992, Mr. Kevin Monson, an employee of Aspen Construction whose responsibilities included the solicitation of bids from subcontractors and coordinating work with various specialty subcontractors, contacted A.K. & R. Whipple Plumbing and Heating, Inc., via the yellow pages. (Transcript 485) Initially, Aspen only needed a small plumbing

job done on a residence of Mr. Thomas Guy in Park City, Summit County, Utah. In response to the telephone inquiry, the dispatcher at A.K. & R. Whipple Plumbing and Heating dispatched Bill Fenstermaker who contacted Mr. Monson. (Transcript 486) Initially when Bill Fenstermaker arrived, he was in a Whipple truck wearing a Whipple uniform with simply an identification tag identifying his first name as Bill. Kevin Monson testified that at the very initial stages of their relationship that he thought Bill Fenstermaker was the owner of Whipple Plumbing. (Transcript 486) Arrangements for the satisfactory performance of the Thomas Guy work were made, completed, and payment rendered accordingly.

6. Bill Fenstermaker later inquired of Mr. Monson as to the type of subcontracting work which Aspen anticipated having in the near future and in particular, the scope and nature of future plumbing and heating jobs. (Transcript 486) Subsequently, Bill Fenstermaker, acting on behalf of Whipple and with actual authority of Whipple, engaged in preliminary negotiations with Monson. Ken Whipple, president of A.K. & R. Whipple Plumbing and Heating, acknowledged during the trial that Bill Fenstermaker was a bidder-foreman - manager who had broad authority to enter into contracts on behalf of Whipple, to negotiate (even renegotiate) contracts and had authority to perform the contracts on behalf of Whipple. (Transcript 106-108) Fenstermaker was compensated on a base salary plus percentage of the work he obtained for Whipple.

7. Bill Fenstermaker negotiated and obtained for Whipple Plumbing the following contracts:

(a) Contract installing two (2) sewer lateral from the street to the curb. (Exhibit 1 - contract price $7,000.00);

(b) Plumbing contract rough and sub-rough and complete installation of fixtures but not including finish fixtures. (Exhibit 9 - contract price $13,000.00);

(c) Heating system contract (two furnaces) with regards to a forced air furnace system. This contract was later modified by the parties. (See Exhibit 19.)

8. Initially the parties contracted to install two (2) 80% efficient furnaces for the sum of $6,341.00. (Transcript 156) After Whipple Plumbing terminated Fenstermaker and before work was started on the HVAC system, Ken Whipple told Aspen that Whipple Plumbing could not perform the HVAC contract for that sum and persuaded Aspen to agree to increase the contract to $11,775.00 for 90 percent efficient furnaces and eventually $12,790.00 inclusive of the gas line ($11,775.00 + $1,015.00). (Exhibit 11)

9. Ken Whipple testified that around late July 1993 he discovered Bill Fenstermaker was embezzling and stealing funds, inventory, and/or materials from A.K. & R. Whipple Plumbing and Heating. Bill Fenstermaker was later convicted of theft of property and at the time of trial was paroled to a halfway house in Salt Lake City. (Transcript 113)

10. Sometime during the course of negotiations between the parties concerning the plumbing and HVAC furnace contracts, the parties became aware that there was a pressurized water line utilized by the Park City Golf Course which would need to be relocated to the lot line. Park City had agreed to pay for the relocation of the water line to a utility easement along the lot line. Aspen claimed Bill Fenstermaker, as an inducement

to obtain certain of the contracts, had indicated to Monson that in his opinion the cost of relocating the lines would only be $300.00 - $400.00 and that he would relocate the line at no cost to Aspen if Aspen would award Whipple the contracts that were under negotiation. Lynn Padan cautioned Bill Fenstermaker that Park City often had their own unique specifications for doing work upon Park City utilities and that before Fenstermaker gave any final estimate he should review the specifications of the project. Mr. Monson testified that after the parties had located the pressurized water line by dragging the backhoe shovel across the property at a 90 degree angle to the estimated pipe location that they (Monson and Fenstermaker) then went over to the Park City Golf Course and talked to a Mr. Pace Ericksen, the groundkeeper in charge of the golf course, who gave them a copy of the specifications. Mr. Monson kept the copy of specifications and later that afternoon faxed a copy to Whipple Plumbing and Heating to the attention of Bill Fenstermaker. (Testimony Kevin Monson beginning Transcript 484.)

11. Relying upon Bill Fenstermaker's estimate, Aspen Construction Company agreed with Park City to move the water line for a total cost of $1,000.00 which Park City eventually paid to Aspen. (Testimony Kevin Monson Transcript 492.)

12. The cost to Whipple Plumbing and Heating in terms of labor, materials, and equipment exceeded Bill Fenstermaker's projection and in an attempt to recoup additional funds from Park City a bill was created for that specific purpose by Bill Fenstermaker for Aspen. This bill in the approximate amount of $1,848.50 (see Exhibit 6) was sent to Aspen who then forwarded it to Park City. Park City declined to pay the additional $848.50. (Transcript 512)

13. Aspen asserted that the agreement between Aspen and Whipple Plumbing (as to the relocation of the water line) was that any portion of any funds which Aspen received over $1,000 would go to Whipple Plumbing but that the $1,000 which the parties had originally contemplated to be a maximum cost would be retained by Aspen as an inducement for Aspen to contract with Whipple Plumbing. Bill Fenstermaker, at the time he agreed to relocate the water line, had stated openly that it would not be that expensive and already had equipment and men in the Park City area. (Transcript 509)

14. Sometime around late July, early August 1993, Whipple Plumbing terminated Bill Fenstermaker and contacted Aspen to find out what the status of the current and past jobs were. Whipple's accounting records were so confused that they did not know what work in progress existed, what past work had been performed, what had been billed, what payments had been received, or what jobs had outstanding amounts still due. (Transcript 522)

15. After the meeting with Ken Whipple, Aspen indicated it immediately became apparent that Whipple Plumbing was attempting to recoup any and all costs which they could connect in any fashion to jobs undertaken by or with Bill Fenstermaker. Initially Whipple sent additional invoices to Aspen Construction for the use of a backhoe that Whipple had left sitting at the job site in the amount of $3,199.17 and later $780.00. (Exhibits 8 and 12 - Job 6) At no time during the trial did Ken Whipple deny and, in fact, admitted that he had given Bill Fenstermaker authority to negotiate new contracts, renegotiate existing contracts, perform the work, supervise the men, and in essence clothed him with apparent and actual authority to act on behalf of Whipple Plumbing. (Transcript

106-108) The only limitation which Ken Whipple claimed existed was that Bill Fenstermaker was not authorized to receive payments personally (i.e. convert funds) but was authorized to receive payments on behalf of the company.

16. During the early stages of the construction of the Thayne's property, when the foundation was being dug, it became necessary for Aspen to place a french drain[9] around the foundation. It is a relatively simple procedure if performed in conjunction with the excavation of the foundation. Bill Fenstermaker approached Lynn Padan about installing the French drain on his own time on a Saturday and the parties agreed to a sum of $1,325.00. Bill Fenstermaker performed the contract and received payment from Aspen in the sum of $1,325.00. Testimony at trial established that this work was customarily performed by excavation contractors, not plumbing contractors, because plumbing contractors were usually not on the job at that early stage of construction. (Transcript 477)

17. After Fenstermaker's termination, Whipple invoiced Aspen for the French drain work performed by Fenstermaker, initially the sum of $1,300.00 and then eventually the sum of $3,162.00. At trial, Whipple sought recovery on its lien for the sum of $3,162.00. (Exhibit 7)

18. Aspen introduced evidence that historically other Whipple employees had contracted directly with Aspen, specifically Arlen Whipple, the brother of the president, Plaintiff Ken Whipple. Ken Whipple testified that no one at Whipple had ever notified Aspen that it was against its company's policy to enter into contracts with its employees. Mr. Padan, on behalf of Aspen, testified that it was not uncommon to hire an employee of a

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[9] *A French drain consists of a PVC pipe with holes in it to collect the water and to drain it away from the foundation.*

subcontractor for simple jobs, inasmuch as some jobs were so insignificant in scope that the subcontractors would not bother with them. If any work was performed with Whipple Plumbing Heating materials, labor, and equipment it was unknown to Aspen.

19. Because Whipple's records were so incomplete, Whipple attempted to reconstruct the work performed. Consequently, Aspen often received invoices from Whipple for various amounts which Whipple asserted were owed and which Aspen disputed as being due. For example, at the beginning of trial Whipple claimed to be entitled to recover $1,100.00 for work done on a sump pump at the Quinn residence. (Exhibit 4) During trial, the parties stipulated that the work was performed on another property and stipulated to dismiss said sum. (Proffer of Wall at pages 96 and 173 of Transcript.)

20. In addition to the plumbing work performed by Whipple pursuant to Exhibit 1 (sewer lateral contract) and Exhibit 9 (rough plumbing work), Whipple also claimed reimbursement for installing sewer laterals from the curb to the house. The trial court found that no separate written contract existed for this work, and although Aspen claimed that in its contract negotiations with Bill Fenstermaker that the work was to be included as part of Exhibit 9, the trial court also found that neither the sewer lateral contract (Exhibit 1) or the finish plumbing contract (Exhibit 9) included such work and that Whipple in fact did perform work on the sewer laterals installing such from the curb to house and was entitled to recovery. There was a dispute between the parties as to the value of such work or the reasonableness of the amount claimed by Whipple for the work. Whipple did not bill Aspen for said work until after Fenstermaker was terminated from employment and then billed Aspen $2,200.00 (Exhibit 24) then $3,200.00 (Exhibit 2) for said work. The only

testimony at trial as to the reasonable value of the work was $1,800.00 - $2,000.00. (Transcript p. 433, 444.) The court awarded Whipple the sum of $3,200.00. (Record 263)

21. During the course of trial the parties stipulated to certain basic facts including the following: (a) that the value of the work performed on the Guy pool house was $1,666.00; (b) that the value of the work performed on the Quinn gas line was $631.00;[10] (c) that the value of the work performed on the Guy gas line was $1,015.00; (d) that Whipple's claims for $1,100.00 as to the Diane Quinn sump pump and $65.00 for pool house miscellaneous would be dismissed; and (e) that Whipple has been paid by Aspen the sum of $17,000.00. (The above stipulations by Aspen as to the undisputed amounts on the pool house, the Quinn gas line, and the Guy gas line however did not include a stipulation that Whipple had valid mechanics' liens, only that the payments and amounts charged by Whipple for work performed on the above jobs were not disputed and that Aspen felt that it had valid offsets as to the foregoing amounts. The trial record is devoid of any proffer or stipulation as to validity of any of the three separate mechanics' lien.)

22. On the issue of the relocation of the Park City irrigation line, the trial court found the testimony of Kevin Monson to be more credible than the testimony of Bill Fenstermaker and accordingly awarded Whipple Plumbing nothing for that work. (Record 262)

23. As to the French drain, the court determined that Aspen's testimony as to the French drain was more credible than that of Ken Whipple and Bill Fenstermaker and awarded Whipple Plumbing nothing for that claim. (Record 262)

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[10] *See Transcript pp. 471, 474-475 Lynn Padan testified he had no dispute as to $1,666.00 work performed on poolhouse, $631.00 gas line, or $7,000.00 as to sewer laterals.*

24. As to the use of the backhoe, the court found that the testimony of Jonathan Krausert, the Aspen job foreman who was on the job daily (to the effect that the backhoe was only used approximately two hours to clean out a caved-in footing) and the testimony of Jim Matthews, an excavator, was more credible (that for the use of the backhoe without an operator the reasonable value of such is $50.00 per hour) and accordingly awarded Whipple Plumbing the sum of $100.00 for the backhoe use. (Record 262)

25. The court found that Whipple was entitled to recover on the plumbing contract the sum of $13,000.00 plus $1,158.00 for extras. (Record 262)

26. The court found that Aspen incurred costs to complete the plumbing work and that the reasonable value of Aspen's costs to complete such was $2,000.00 and awarded Aspen a $2,000.00 offset. (Record 262)

27. The trial court found that Aspen had shown by a preponderance of the evidence that there were deficiencies in the systems (leakage and poor air flow to one room as well as no ducts to a portion of the basement in the area of the wet bar -- system not balanced or zoned). However, it found Aspen failed to show by preponderance of the evidence that it would be necessary to completely remove the existing system and install a new system. The court was not convinced and ruled Aspen has not proven by a preponderance of the evidence that the three furnaces which were installed were inadequate or that the ducting into and out of the furnaces was improperly sized. The court was not convinced that any specification or recommendation of the manufacturer has not been followed and the court was also not convinced that the evidence established a higher industry standard which it found at most was vague and not convincing to the court. The

court ruled that Whipple should be allowed to receive compensation for the HVAC contract for $9,173.00. (Record 263)

28. The court found that many of the problems with the furnace system could be addressed with further adjustments and fine tuning. The court found that work would need to be done to correct the deficiencies and the court awarded Aspen the sum of $7,000.00. In addition, the court found that Aspen's cost to finish the HVAC (furnace) work was reasonable and awarded Aspen the sum of $3,092.00 - total $10,092.00. (Record 263)

29. The court found that Whipple performed and was entitled to $1,015.00 for the gas line on the HVAC system. (Record 263)

In summary, the court ruled on each claim as follows:

Job	Description	Lien Claim Amounts	Recovery Granted
1	Laterals	$10,200.00	$3,200.00
2	T. Guy Pool house	1,665.92	1,666.00
3	D. Quinn Sump Pump	1,100.00	.00
4	Mun. Water relocate	6,660.80	.00
5	French Drains	3,162.05	.00
6	Backhoe 77 Thaynes	780.00	100.00
7	Pool House Misc.	65.00	.00
8	D. Quinn Gas Line	631.00	631.00
9	77 Thaynes Plumbing	13,358.00	12,158.00*
10	77 Thaynes Heating	12,265.50	9,173.00**
11	77 Thaynes Gas Piping	1,015.00	1,015.00
	Subtotal:	$50,903.27	$27,943.00
	Award to Aspen		- 7,000.00
	Payments:	$-17,000.00	$-17,000.00
	Totals:	$33,903.27	$3,943.00***

* 13,000 + 1,158 - 2,000 = 12,158.00
** 12,265.50 - 3,092.00 = 9,173.00
*** 3,943 + 7,000 = 10,943.00

SUMMARY OF ARGUMENT

Judge Brian's pretrial ruling allowing Whipple Plumbing to pursue and obtain equitable recovery for the HVAC - furnace work, which Whipple was not licensed to perform, was error. Judge Noel compounded this error when he entered Conclusion of Law No. 5 and granted Whipple an order of foreclosure inclusive of the HVAC work, notwithstanding Judge Brian's pretrial order which dismissed the HVAC mechanics' lien claim and only allowed "equitable" recovery.

The evidentiary basis to support the trial court's award of $3,200.00 for the sewer laterals and $7,500.00 attorney fees was insufficient and requires reversal. It was further error for the trial court to grant Whipple Plumbing's Motion to Reopen on the grounds of "in the interests of justice." The evidence before the trial court did not support the trial court's factual or legal conclusions that the Plaintiff had met its burden of proving compliance with the statutory requirements of a mechanics' lien foreclosure action.

The trial court erred in not granting Aspen's pretrial Motion to Dismiss and Motion in Limine where the Plaintiff failed to answer the July 1995 discovery or to comply with the trial court's Scheduling Order. It compounded this error when it allowed Ken Whipple to testify at trial as an HVAC expert witness when the Plaintiff never disclosed that Ken Whipple would be called as such and still further compounded this error when it refused to allow testimony of Aspen's mechanical engineer Fred Nash in rebuttal to Ken Whipple's surprise HVAC expert testimony.

ARGUMENT

I

JUDGE BRIAN COMMITTED ERROR AS MATTER OF LAW WHEN HE QUALIFIED HIS ORDER DISMISSING WHIPPLE'S HVAC (FURNACE) LIEN CLAIM AND ALLOWED WHIPPLE PLUMBING EQUITABLE RECOVERY FOR THE HVAC - FURNACE WORK IT WAS NOT LICENSED TO PERFORM. THE COURT'S FAILURE TO FOLLOW THE STATUTORY MANDATE THAT NO UNLICENSED CONTRACTOR MAY COMMENCE OR MAINTAIN ANY ACTION FOR COLLECTION OF COMPENSATION FOR PERFORMING WORK FOR WHICH A SEPARATE HVAC LICENSE WAS REQUIRED CONSTITUTES ERROR.

Section 58-55-604 U.C.A. provides:

> No contractor may act as agent or commence or maintain any action in any court of the state for collection of compensation for performing any act for which a license is required by this chapter without alleging and proving that he was a properly licensed contractor when the contract sued upon was entered into, and when the alleged cause of action arose.

Judge Brian failed to strictly apply the statutory mandate and in his order dismissing Whipple's claim for the HVAC - furnace work he fashioned an "equitable" remedy which is in express contradiction of the statute. Judge Brian's departure from the statute is presumptively based upon the "common law exceptions" discussed in Govert Copier, infra. Aspen respectfully submits that the court's pretrial order constitutes error for the reasons discussed below.[11]

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[11] *In responding to Aspen's Motion to Dismiss, Whipple conceded the relevancy of §58-55-604 U.C.A. and the fact that Whipple Plumbing did not possess an HVAC license. Whipple asserted however that the HVAC work was simply "incidental" to the plumbing work and that the "common law exceptions" discussed in Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah App. 1990) applied.*

The proposition that the HVAC - furnace work (for which the legislature and administrative body charged with enforcement of the act have established a specific HVAC license - category S350, S353) was merely incidental to the plumbing work is absurd and will be addressed in the Appellant's Reply Brief, if necessary.

The law clearly requires that in order for Whipple to recover on any claim for compensation for work other than that which it is licensed to perform, it has the burden of establishing that the purpose of the licensing statute was met. Govert Copier Painting v. Van Leeuwen, 801 P.2d 163, 168, 170 (Utah App. 1990). When Judge Brian granted Aspen's Motion to Dismiss, he determined that Whipple had not met this burden. Notwithstanding any express finding, either in his bench ruling (Record 255-261 - Transcript of Bench Ruling) or the order (Record 113, 119) that the "common law exceptions" should be applied he ordered that Whipple would be allowed to pursue "equitable recovery." Point in fact, he expressly found that the "statute Section 58-55-604 U.C.A. is controlling in this case." (Record 113, paragraph 1; Record 257, lines 1-4.)

In American Rural Cellular, Inc. v. Systems Communication Corp., 890 P.2d 1035 (Utah App. 1995) this court discussed the factors the Utah courts have historically considered in applying what has been termed the "common law exceptions" to the statute's strict application:

1. The contracting party possesses knowledge and expertise in the field such that there is no need of the protection the licensing statute was intended to provide;

2. The reason the contractor was unlicensed;

3. Whether the work of an unlicensed contractor was supervised by a general contractor;

4. Whether the party seeking the protection of the licensing statute relied upon the competency which is inferred from an unlicensed contractor holding themselves out as a licensed contract; and

5. Whether the party seeking protection was protected by a performance bond.

The test is a multi-factor analysis and no one factor predominates. Am. Rural Cellular v. Sys. Comm. Corp., 890 P.2d 1035, 1041 (Utah App. 1995).

Neither the Utah Supreme Court nor this court have ever applied the "common law exception to the statute" in an instance where the subcontractor has misrepresented its licensing status. In this case, the Plaintiff A.K. & R. Whipple Plumbing and Heating held only a S210 General Plumbing Contractors License[12] but expressly and impliedly misrepresented to Aspen that it was licensed to do HVAC forced air heating (furnace) work when Bill Fenstermaker solicited this work. This ruse was continued when Ken Whipple renegotiated the HVAC contract before the work began. The exception is a creature of equity designed to soften the harshness of the strict statutory prohibition which by its wording is mandatory. See §58-55-604 U.C.A. It has never been applied where there are "unclean hands" and the unlicensed contractor misrepresented its qualifications to perform such work, and particularly where such work is later found by the court to be deficient. (Record 263) Contrast: Lingell v. Berg, 593 P.2d 800, 805 (Utah 1979) [contractor possessed the technical competence and financial qualifications for licensure but had inadvertently allowed license to lapse]; Loader v. Scott Const. Corp., 681 P.2d 1227, 1229-30 (Utah 1984) [court found good faith mistake regarding coverage under a partner's license].

The Plaintiff A.K. & R. Whipple never held a sheetmetal fabrication or HVAC (heating) contractors licenses. Whipple Plumbing had never demonstrated competency to the state and actively misled Aspen concerning its licensing status by soliciting the HVAC (heating) work. Anthony Neeley, Aspen's HVAC expert, testified that his inspection of the

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[12] *Which allows it to perform work on boiler heating systems, see Record 78, 88-94.*

heating systems disclosed defects which included but were not necessarily limited to the following:

1. System (the three furnaces) fails to meet standards of industry. (Transcript p. 295)

2. Two of furnaces oversized (Transcript 295)

3. Fittings very poor (Transcript 296) and sheetmetal work not fabricated properly. (Transcript 296)

4. Zoning improper. (Transcript 297)

5. No heat to basement room. (Transcript 298)

6. Thermostats miswired or not properly zoned. (Transcript 219-300)

7. Duct sizing too small forcing furnaces to cycle on and off therefore providing insufficient heat. (Transcript 300-301)

8. Leaks in trunk line. (Transcript 303)

9. Undersized cold air intake line. (Transcript 303)

10. Heat not balanced. (Transcript 308)

11. Costs of HVAC work to fix $13,094.00 not including tearing out defective duct work and repairing and refinishing carpentry, sheetrock, etc. (Exhibit 25.)

The trial court ultimately found the work to be deficient. (Record 263)

The common law exceptions to the strict application to the general rule (statute) is grounded in the notion that there is no need for rigid insistence on proper licensure when the contracting party is otherwise protected from the harm the statute was designed to prevent, i.e. inept and irresponsible builders. Simply because a party is a general contractor does not mean it does not need the statutory protection from non-licensed specialty contractors soliciting work for which they are neither licensed or qualified to perform. After

4 1/2 days of trial, Judge Noel found that the heating system had problems (deficiencies in the heating system - Record 263). This case is a prime example that just because you have general building knowledge you can still be harmed by other specialty contractors in those areas where a specific rather than a general license is required.

Without looking to the specific facts and circumstances of each case, any automatic rule that provides that if the party seeking the protection of the statute is a licensed contractor, such fact alone prevents the application of the statute and should be rejected. The Defendant concedes this is one factor the courts have looked to. However, this factor alone is not enough to escape the statutory licensing requirement, particularly given the facts of this case and the multi-factor test which is applied.

II

JUDGE NOEL COMMITTED ERROR WHEN IT GRANTED WHIPPLE PLUMBING'S MOTION TO REOPEN ON GROUNDS THAT ARE NOT PROVIDED IN RULE 59 U.R.C.P. TO-WIT: "IN THE INTERESTS OF JUSTICE."

Prior to the entry of any formal Findings of Facts & Conclusions of Law and Judgment, Whipple Plumbing filed a Motion to Reopen the proceedings to address and cure the evidentiary defects which Aspen had raised in its closing argument and the various post trial pleadings.

Since a lien foreclosure action is a statutory cause of action, proving compliance with the requirements set forth in the statute is the burden of the lien claimant. AAA Fencing Co. v. Raintree Development, 714 P.2d 289 (Utah 1986); Interiors Contracting, Inc. v. Smith, Halander & Smith Assoc., 827 P.2d 963, 965 (Utah App. 1992).

As a basic proposition, since no written "Notice of Claim" had been introduced into evidence there was no evidentiary basis to establish that Whipple had complied with the statutory provisions contained in Title 38, Chapter 1. Besides proof of the written "Notice of Claim" Aspen claimed there were also other problems with the evidence to support the lien claim. (See discussion pp. 35-36 below.)

The trial court treated Whipple Plumbing's Motion to Reopen as a Motion for a New Trial even though Whipple initially failed to identify in its original Motion any specific grounds under Rule 59 (Record 336). See College Irrigation Co. v. Logan River and Blacksmith Fork Irrigation Co., 780 P.2d 1241, 1245 (Utah 1989).

In Hancock v. Planned Development Corp., 791 P.2d 183, 184 (Utah 1990), the Utah Supreme Court was faced with a similar circumstance. Prior to the entry of formal Findings of Fact and Conclusions of Law, the Plaintiff made a Motion seeking relief from the judgment about to be entered. The judge viewed the Motion as one to reopen the case which he denied. On appeal it was the Plaintiff's contention that the judge abused his discretion in refusing to reopen the case. In discussing the grounds and procedural aspects of ruling upon a Motion to Reopen, the Court stated the following:

> Pursuant to Rule 59(a) of the Utah Rules of Civil Procedure, the court sitting without a jury may open the judgment if one has been entered, take additional testimony, amend findings and conclusions and direct the entry of a new judgment.
>
> Ruling on motions for a new trial are addressed to the sound discretion of the trial court, and its decision will be reversed on appeal only for clear abuse thereof. However, the trial court has no discretion to grant a new trial absent a showing of one of the grounds specified in the rule.
>
> In this case, the substance of the plaintiff's motion to reopen was newly discovered evidence. While newly discovered evidence is a ground specified in the rule, a deed executed after trial and thus not in existence at the time

> of trial does not constitute newly discovered evidence. Newly discovered evidence must relate to facts which were in existence at the time of the trial and cannot be based upon facts occurring subsequent to the trial. Thus, it did not lie within the prerogative of the trial judge to grant plaintiff's motion to reopen, and plaintiff's contention to the contrary is without merit. (Emphasis supplied by Defendant.)

This case is similar to the Hancock case in that the trial court had not yet formalized any Findings of Fact and Conclusions of Law. As pointed out in Hancock, the trial court has no discretion to grant a new trial absent a showing of one of the grounds specified in the rule, i.e. Rule 59(a)(1-7); in accord Tangaro v. Marrero, 13 Utah 2d 290, 373 P.2d 390 (1962). Aspen respectfully submits that the grounds found by the trial court, i.e. "in the interest of justice" constitutes a clear abuse of discretion and therefore it was error to grant Whipple's Motion to Reopen. No where in Rule 59(a)(1) - (7) is "in the interest of justice" stated as grounds for a new trial. (See Record pp. 1731 and 1739.)

Even assuming for argument sake that the court had authority to allow the Plaintiff to reopen its case, the trial court abused its discretion in allowing witnesses to testify at the September 1996 post trial proceeding who were never designated in the discovery or pursuant to the Scheduling Order. There was no fairness or consistency in the trial court's approach to this matter and it was apparent that no matter what it took to achieve the end result the trial court was going to allow Whipple to reopen to supplement the trial record.

III

THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FACTUAL AND LEGAL CONCLUSIONS THAT WHIPPLE PLUMBING HAS MET ITS BURDEN OF ESTABLISHING COMPLIANCE WITH THE MECHANICS' LIEN FORECLOSURE STATUTE.

A. Mechanics' liens are statutory creatures unknown to the common law. The purpose of the Utah mechanics' lien law is to provide protection to those who enhance the

value of a property by supplying labor or materials. Interiors Contracting, Inc. v. Navalco, Utah, 648 P.2d 1382 (1982). Although liens and pleadings arising under the statute will be liberally construed to effect the desired goal, compliance with the statute is required before a party is entitled to the benefits created by the statute. First Security Mortgage Co. v. Hansen, Utah, 631 P.2d 919 (1981); see also Schofield v. Copeland Lumber Yards, Inc., Nev. 692 P.2d 519 (1985); Lewis v. Wanamaker Baptist Church, 10 Kan.App.2d 99, 692 P.2d 397 (1984); AAA Fencing Co. v. Raintree Development and Energy Co., 714 P.2d 289 (Utah 1986).

Aspen is acutely aware that in order to prevail on this issue it must first "marshall all evidence supporting the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence.'" Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah App. 1989) (quoting In re Bartell, 776 P.2d 885, 886 (Utah 1989)).[13]

In order to meet this burden, Aspen's counsel has carefully reviewed the trial record and summarized in Addendum 1B the references in the trial record where testimony or other evidence was taken or admitted concerning the liens and each of the statutory elements. (See Addendum 1.)

Evidence of Lien. The trial court's Minute Entry concerning the lien claim states:

> At closing argument counsel for Aspen argued that Whipple had not met the threshold requirement of establishing mechanics liens. However it is the courts recollection that there was oral evidence that liens had been filed, to which there was no objection, and in addition the case was tried over a four

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[13] *In light of the fact that both the Plaintiff and the trial court saw the need to reopen the case and supplement the record as discussed above, the dearth of any evidence to support the findings prior to the September 18, 1996, hearing should be self-evident.*

> and one-half day period without any objections to any of the evidence of Whipple's claimed damages on the basis of no mechanic's liens. The court is going to allow the claims of Whipple to stand. (R.262)

The accuracy of the trial court's recollection is borne out in Addendum 1. There was oral testimony lien(s) were filed. Notwithstanding this oral testimony of a lien being filed, there still exist the basic problems pointed out in part II above - since no written "Notice of Claim" was introduced into evidence, how can the Plaintiff establish a sufficient evidentiary basis that it has complied with the statute, i.e. proof of when the lien was filed, where the lien was filed, was the lien filed by an authorized person, was the lien timely filed, was the action timely initiated, did the written notice of lien contain the statutory elements and proof of having complied with the mailing requirement to be awarded attorney fees. In addition, Aspen raised the following concerns: First, this case is actually three (3) cases consolidated for purposes of trial. There must be evidence of statutory compliance in each case. Second, Aspen would respectfully submit that as a matter of law, oral testimony of one or more liens being filed does not meet Whipple's burden of proof concerning the statutory requirements under §38-1-7. Third, even with the trial court's recollection of oral testimony of evidence of liens being filed, the determination of the legal adequacy of such evidence presents a question of law, to be reviewed for correctness. Kasco Services Corp. v. Benson, 831, P.2d 86, 89 (Utah 1992).

Most importantly however, Aspen would submit that the evidence marshalled in Appendix 1B is woefully inadequate to meet the elements set out below, and that the record is devoid of a sufficient evidentiary basis exists that establishes that the liens testified to orally complied in the following particulars:

1. The property does or does not meet definition of residence under §38-11-102 (38-1-7(1) U.C.A.);

2. The actions were commenced within the 180 day/1 year statutory time frame (§38-1-11);

3. Notice of claim filed within 90 day statutory time frame (§38-1-7);

4. Was a written notice of claim (§38-1-7) containing:

5. The name of the reputed owner if known or, if not known, the name of the record owner was stated (§38-1-7);

6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished the equipment or material was stated (§38-1-7);

7. The time when the first and last labor or service was performed or the first and last equipment or material was furnished was stated (§38-1-7);

8. A description of the property, sufficient for identification was stated; and

9. The notice of claim contained the signature of the lien claimant or his authorized agent and an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents (§38-1-7);

or that:

10. Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.

11. Evidence of Lis Pendens being filed.[14]

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[14] *See* Interlake Distributors, Inc. v. Old Mill Towne, ____ P.2d ____, 339 UAR 7 (Utah App. 1998).

Since these are the statutory elements, proof of compliance with each of these elements is mandatory. Even if Whipple had been successful in getting each of the three notice(s) to claim lien admitted during the trial, there must still exist an evidentiary basis as to each of the elements 1 -11 above. The evidence of statutory compliance is not adequate to support the trial court's finding that Whipple is entitled to foreclose a mechanics' lien claim.[15]

B. There is no evidentiary basis to support an award of $3,200.00 for the sewer laterals. The only evidence concerning reasonable value of the work Whipple Plumbing performed is $1,850.00 -$1,900.00.

The Plaintiff Whipple's case-in-chief consisted primarily of a series of questions about Whipple's invoices which were marked, identified, and then Ken Whipple would identify the work performed (i.e. sewer lateral extended from curb to house), what the charges were and whether the invoice had been paid. At no time did Whipple Plumbing put into evidence through any of their witnesses the reasonable value, customary charge or similar evidence of value (see Addendum 1A).[16]

Exhibit 24 demonstrates that at one time Whipple felt the value was less than $3,200.00. (See Exhibit 24 - Whipple's invoice for sewer lateral for $2,200.00.) The only evidence of "reasonable value" was that of Jim Matthews, a licensed excavator who testified that a reasonable charge would be $1,800.00 - $2,000.00 (Record 433/11-16; See also Record 443-444.)

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[15] *As to the plumbing work (as to which it was licensed) Whipple may be entitled to recover on the basis of quantum merit/unjust enrichment but not on a mechanics' lien claim.*

[16] *See particularly Transcript pages 32-35 testimony of Ken Whipple.*

C. Conclusion 5 which allows Whipple Plumbing an order of foreclosure as to the HVAC work which the trial court granted equitable relief in the amount of $9,173.00 is contrary to the law of the case. Conclusion 5, includes the HVAC work as part of the order of foreclosure and is therefore clear error. As discussed above, Judge Brian's pretrial ruling dismissed Whipple's statutory lien claim as to the HVAC work. (Record 113) Notwithstanding, the Findings of Fact & Conclusions of Law (Finding #5 Record 510) entered by the court includes the $9,173.00 (less $7,000.00 offset) Judge Noel found Whipple was entitled to recover for the HVAC work which is included as part of its order of foreclosure. This is an apparent error which should be corrected.

IV

THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FACTUAL AND LEGAL CONCLUSIONS THAT WHIPPLE PLUMBING WAS ENTITLED TO AN AWARD OF ATTORNEY FEES. ON THE CONTRARY, THE TRIAL COURT ERRED IN REFUSING TO AWARD ASPEN ITS ATTORNEY FEES WHEN IT PREVAILED AGAINST WHIPPLE ON THE HVAC PORTION OF WHIPPLE'S LIEN CLAIM.

If Aspen is successful in prosecuting this appeal and defeats Whipple's mechanics' lien claims, then Whipple cannot be awarded its attorney fees. §38-1-18 U.C.A.[17]

Assuming for sake of argument (and only for purposes of argument) that Whipple can somehow prevail on its mechanics' lien claims (notwithstanding the problems discussed above) the evidence before the trial court is still inadequate to support an award of attorney fees to Whipple Plumbing.

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[17] *Section 38-1-18 U.C.A. requires application of a "successful party" standard, not "prevailing party".*

In order to meet Aspen's obligation to marshall the evidence, Aspen's counsel has reviewed the trial record and summarized in Addendum 1C the references in the trial record where testimony, proffers, or other evidence was admitted concerning attorney fees. (See Addendum 1C.)

A. No evidence as to apportionment of fees. In Paul Mueller Co. v. Cache Valley Dairy Assn., 657 P.2d 1279, 1287 (Utah 1982) Justice Hall discussing a prior holding of that Court stated:

> This Court has on numerous occasions held that attorney's fees cannot be allowed unless there is evidence to support them. Id. at 1046. It is beyond dispute that an evidentiary basis is a fundamental requirement for establishing an award of attorney fees. It follows, therefore, that an award made without adequate evidence to support it constitutes an abuse of discretion and must be overruled by this Court. (p. 1287)

A fundamental principal involved in an award of attorney fees is that when counter or cross-claims are involved there must be enough proof to enable the court to distinguish between the portion of the fees spent in prosecuting or defending the claim as to which attorney fees are recoverable versus that portion spent in defending or prosecuting the claims as to which attorney fees are not recoverable. Utah Farm Production Credit Assn. v. Cox, 627 P.2d 62 (Utah 1981); Valcarce v. Fitzgerald, 331 UAR 68, 74 (Utah 1997); Paul Mueller Co. v. Cache Valley Dairy Assn., 657 P.2d 1279 (Utah 1982).

In this matter, the record is totally devoid of any evidence apportioning or attempting to apportion Whipple's attorney fees between the three cases, let alone between the plumbing (mechanics' lien) claims, the HVAC claims that Judge Brian's pretrial order dismissed then allowed Whipple to pursue as an equitable claim, the Counterclaim Aspen filed for damages as to the defective HVAC system, or the various other claims identified

in Whipple's Exhibit 12. The trial court's attempt to overcome this evidentiary deficiency is reversible error. The award was without any evidentiary basis and is therefore an abuse of discretion. (See Minute Entry of December 5, 1996 - Record 420.)

Even Whipple's counsel recognized the inherent problem created by the trial court's attempt to award fees under the circumstances where there was no evidentiary basis to do so. Whipple's solution: Instead of apportioning the $7,500.00 attorney fees awarded between the three (3) cases simply add the $7,500.00 fees to each lien amount which facially results in a $7,500.00 attorney fees award for each case.

REF	Lien Amount	Atty. Fees	Record
Case 94-14CN	8,646.00	7,500.00	Conclusion 2 Record 508
Case 94-12CV	1,666.00	7,500.00	Conclusion 4 Record 509
Case 94-13CV	631.00	7,500.00	Conclusion 5 Record 510

As you can imagine, this solution is troubling to Aspen and a significant reason it has sought review by this court.

Because of the trial court's impatience with the post-trial practice, the tripling of some costs may also be present as well as the tripling of the attorney fees. (See Record 519 - deposition costs of 1,055.30 for each case - only 1 day of depositions occurred.)

B. The trial court erred in failing to award Aspen its attorney fees in defending against the HVAC mechanics' lien.

In First General Services v. Perkins, 918 P.2d 480, 486 (Utah App. 1996) this Court held that the successful defense of counterclaims which would otherwise defeat the principal lien claim, in whole or in part, must necessarily be considered for the purpose of awarding attorney fees under the mechanics' lien statute.

Judge Brian recognized this at the May 8, 1995, hearing when the following dialogue occurred:

> MR CHAMBERS: I apologize. I wanted to raise the issue to see where the Court was going, because the Court has gone a lot further than the motion to dismiss anticipated. So I am not asking for it right now. I just wanted to see
>
> THE COURT: The Court would probably be inclined, with everything else being equal, to award fees and costs to bring the matter to a final resolution incurred by the defendant.

Record 259, lines 6-13.

Aspen is the successful party on the HVAC portion of the mechanics' lien claim, and Aspen is entitled to be awarded its reasonable attorney fees incurred in connection therewith. §38-1-18 U.C.A. The case should be remanded to the District Court with orders to conduct an evidentiary hearing as to Aspen's fees incurred below and on this appeal with respect to this aspect of the case. (See also transcript of February 15, 1996 hearing pp. 17-20.)

V

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT MADE THE FOLLOWING RULINGS[18]:

A. DENIED DEFENDANT'S MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION IN LIMINE.
B. ALLOWED KEN WHIPPLE TO TESTIFY AS AN HVAC EXPERT
C. REFUSED TO ALLOW REBUTTAL TESTIMONY FROM ASPEN'S EXPERT WITNESS

A. The trial court committed error in failing to grant Defendant's Motion to Dismiss and in the alternative Motion in Limine when the Plaintiff failed to comply with

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[18] *Aspen respectfully submits the matters discussed in this part of the brief raise important procedural issues which because of their nature rarely are addressed by the Appellate courts and as a consequence there is little guidance for practitioners and trial judges in the case law.*

Judge Brian's pretrial order from the hearing of May 8, 1995, the Scheduling Order and also failed to respond to the July 1995 trial set of discovery Aspen propounded to Whipple to prevent surprise. Notwithstanding, the trial court allowed the Plaintiff to proceed to trial without timely designating its witnesses as required in the Scheduling Order and the discovery propounded to Whipple Plumbing.

In denying Aspen's pretrial Motion to Dismiss and in the Alternative Motion in Limine, Judge Noel emasculated the primary purpose of the Scheduling Order. The Motion was timely filed because Whipple not only had failed to comply with the Scheduling Order but also because Whipple failed to respond to outstanding discovery sent prior to trial to prevent surprise. (See Record 134 and Record 124, footnote 2.) It appears that the trial court's decision was based upon its perception that Aspen had not been prejudiced -- since Whipple had answered interrogatories (propounded by Aspen in January 1995) in March 1995 ergo Aspen in October 1995 was not prejudiced. (See Transcript 15-17)

Aspen respectfully submits that the trial court misapplied the law and that the trial court abused its discretion in the following respects:

First: The trial court's reasoning that having answered discovery in March 1995 that the objectives which the Scheduling Order are intended to address have also been accomplished, is flawed. The important objectives accomplished by a Scheduling Order was recognized by Justice Zimmerman in Turner v. Nelson, 872 P.2d 1021, 1023 (Utah 1994) when writing for the majority the following was stated in relationship to a party's violation of a Scheduling Order which established a discovery cutoff date:

> "As a threshold matter, it is well within the trial court's authority to order the parties to disclose all potential witnesses in advance of trial". See Arnold v.

> Curtis, 846 P.2d 1307, 1310 (Utah 1993); Hardy, 776 P.2d at 924-25. Such disclosure serves a number of significant purposes. See, e.g., Kott v. City of Phoenix, 763 P.2d 235, 238 (1988). It gives both parties the opportunity to prepare adequately for trial, including, among other things, deposing witnesses, investigating witnesses' testimony, and preparing an effective cross-examination. See, e.g., Gardner, 505 P.2d at 52. It also encourages the parties to make a serious effort to investigate the facts and discover all relevant witnesses in a timely manner. Finally, it furthers the orderly and efficient administration of justice by avoiding trial delays which might otherwise be necessary to accommodate the need to prepare for a surprise witness.
>
> Given the significant policies, a trial court does not abuse its discretion by refusing to allow a party to call a surprise witness absent "good cause" for failure to disclose the witness as required by a court order or rule. See Arnold, 846 P.2d 1310; Hardy, 776 P.2d at 925. When the offering party contends that the undisclosed witness is necessary to rebut the adverse party's evidence, the issue hinges on whether the evidence "sought to be rebutted could reasonably have been anticipated prior to trial". (Omitting citations in original.)

Although dismissal would have been a harsh penalty, there are several cases in which the appellate courts have held that a party's dilatory conduct justified such action. Rule 16(b) U.R.C.P.; Turner v. Nelson, 872 P.2d 1021, 1023 (Utah 1994); DeBry v. Cascade Enterprises, 879 P.2d 1353, 1361 (Utah 1994); Hardy v. Hardy, 776 P.2d 917, 925 (Ut. Ct. App. 1989).

Counsel for the Plaintiff failed to answer the trial set of discovery, not even an indication that the information previously supplied was correct and no additional information was available or needed to be disclosed. By failing to answer the discovery or comply with the court's Scheduling Order, the Defendant was greatly prejudiced. It deprived the Defendant of the opportunity to adequately prepare for trial, including but not limited to deposing the witnesses that were positively designated for trial, investigate their potential testimony, and prepare effective cross-examination. Depositions are costly and although

Aspen could have taken the depositions of the witnesses identified in the March 1995 Answers to Interrogatories, Aspen was attempting to limit the number of depositions to those witnesses which would actually be testifying at trial. This is the reason for what Aspen has termed in this brief its "trial" set of discovery. By failing to respond, Whipple gained a definite tactical advantage. In Debry, the Court observed that the purposes served by the Scheduling Order were to save the Defendant from having to assume that all eleven witnesses would be called at trial and from incurring the expense of having to prepare for testimony that would not be presented.

As stated by the Court:

> A trial court has necessary discretion in managing cases by pretrial scheduling and management conferences. Utah R.Civ.P. 16. A requirement the parties designate their expert witnesses [or for that matter any witnesses] by a certain date before trial allows the parties to prepare for trial by deposing witnesses, planning for effective cross-examination, and obtaining rebuttal testimony. DeBry p. 1361.

Aspen incurred additional attorney fees in trial preparations and Whipple's disregard of the Scheduling Order and discovery process was met with only a verbal reprimand. The trial court complained about the trial not being completed on schedule and eventually dragging out to 4 1/2 days. Aspen respectfully submits that the trial court must bear its fair share of responsibility for this consequence. Since it failed to enforce its own Scheduling Order what else can be expected? If the Scheduling Order is allowed to be disregarded, the orderly administration and conduct of the trial is obviously going to be frustrated. Disruptions, delays, and surprises which were encountered in this trial were a natural consequence of the trial court's failure to enforce the Rules of Procedure. It has also resulted in the prolonged post trial proceedings which are not insubstantial.

In addition, because the Plaintiff failed to disclose its witnesses by the August 1 deadline including its expert witnesses, Aspen was unable to retain and identify the necessary witnesses which it would then be required to have to rebut the Plaintiff's expert witnesses. This was the specific reason why the trial court gave the Defendant an additional two (2) weeks before the Defendant was required to disclose its witnesses.

Second: The trial court's ruling effectively made the Scheduling Order optional. The Scheduling Order was not optional. The order cannot be unilaterally ignored. It was incumbent upon both Whipple and Aspen to comply. Because the Scheduling Order was not followed, this trial encountered delay, surprise witnesses, and other problems which not only lengthened trial but has complicated the post trial matters and led to this appeal.

Third: There is a certain amount of sad irony, even incongruity, in the trial court's ruling. The Plaintiff Whipple conducted limited discovery -- only depositions. It did not submit interrogatories. The trial court, by allowing Whipple's March 30, 1995, Answers to Discovery to stand and to qualify as serving the underlying purpose of Scheduling Order, Aspen was actually disadvantaged by prudently conducting its discovery.[19]

The prejudice to Aspen was compounded by the fact that following the hearing of May 8, 1995, Whipple failed to obtain or seek the corrective measures ordered by Judge Brian. Having failed to comply with Judge Brian's order, Whipple was still allowed to seek

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[19] *Judge Noel throughout the trial would refer to Whipple's March 30, 1995, answers to interrogatories (R 180, 197). If Whipple had identified the witness in March then the witness was allowed to testify. If the witness was not identified then the witness was not allowed to testify. The Scheduling Order required Whipple to designate its witnesses by August 1, 1995, and gave Aspen until August 15, 1995. When Whipple failed to comply with the August 1, 1995 deadline, Aspen, as soon as it possibly could, brought the matter to the attention of the trial court to avoid the confusion which ensued. Because Whipple did not send interrogatories inquiring about Aspen's witnesses there was no such bright line test which it applied to Aspen. The trial court attempting to be evenhanded, excluded any witness Aspen had not designated at the September pretrial conference. Whipple's failure to update their discovery responses or to comply with Scheduling Order tactically worked in its favor.*

and eventually obtain the equitable relief Judge Brian's order was conditioned on. Where is the equity in such a result?

B. The trial court compounded this error when it allowed Mr. Ken Whipple to testify as an HVAC expert witness during the November 1995 phase of the trial, particularly when Mr. Ken Whipple was not designated as an HVAC expert witness nor qualified as an HVAC expert at the outset of the trial. (See Record 180, 197) The trial was interrupted and occurred over a two-month period allowing Mr. Ken Whipple who was not HVAC licensed when trial began in October to eventually obtain an HVAC contractor's license and testify as such in the November proceedings.

Over Aspen's objections, the trial court allowed Ken Whipple to testify as an HVAC expert even though not designated in either the discovery (see Record 191--Ken Whipple identified only as a journeyman plumber) or as discussed above in the Scheduling Order. The was no good faith effort on Whipple's part to apprise Aspen of this development, even though the discovery rules contemplate that the obligation is a continuing one, particularly if the previous response becomes misleading or incomplete. This tactic was extremely prejudicial to Aspen's case. Ken Whipple's testimony greatly confused the issue as to the adequacy of the HVAC system and exactly what the "standard of the industry" was. (See Record 263.) The trial court should not have allowed Ken Whipple to testify as an HVAC expert witness, particularly since he was not qualified as such at the outset of the trial in October 1995 nor was he disclosed as an HVAC expert in any of its discovery responses.

C. The trial court further compounded the above errors when it failed to allow rebuttal testimony of the Defendant's expert witnesses and other rebuttal evidence.

Aspen, anticipating the need to address on rebuttal Whipple's evidence concerning the adequacy of the HVAC system, retained for this specific purpose the services of a mechanical engineer, Fred Nash, to testify as a rebuttal witness. The trial court having allowed Ken Whipple to testify as an HVAC witness, Aspen felt it was patently unfair of the trial court to limit its expert's testimony. The trial court allowed the testimony in some areas and limited inquiry into other areas. Aspen's counsel proffered the testimony he anticipated eliciting from Fred Nash in an attempt to help clarify the record. (See Transcript 978-988.)

There appeared to be confusion over whether the testimony was rebuttal testimony or part of the Defendant's case-in-chief. (See Transcript 984.) Part of the confusion perhaps existed because Aspen's counterclaim for the defective HVAC system not only served as an affirmative defense[20] but also as a counterclaim as to which it could, dependent upon the evidence, obtain a judgment against Whipple. The trial Court seemed confused as to what would constitute rebuttal testimony.

> Rebuttal evidence is evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence. *Board of Education v. Barton*, 617 P.2d 347, 349 (Utah 1980). Randle v. Allen, 862 P.2d 1329 (Utah 1993).

In Randle v. Allen, supra, the Utah Supreme Court held that even though evidence is repetitive such should as a general rule be admitted.

> As a general rule, testimony presented for the purpose of rebuttal should be admitted, even if the rebuttal is somewhat repetitive of testimony on issues addressed during the case-in-chief. *Workman v. Henrie*, 71 Utah 400, 266 P. 1033, 1036 (Utah 1928); *see also United States v. Chrzanowski*, 502 F.2d 573, 576 (3d Cir. 1974); *Steward v. Atlantic Ref. Co.*, 240 F.2d 715 (3d Cir. 1957); *State v. Hewitt*, 73 Idaho 452, 254 P.2d 677, 680 (1953). *See generally* Michael

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[20] *The plaintiff in a mechanic's lien foreclosure action must establish that he has benefitted the property. If the HVAC system is defective it diminishes the value of the mechanic's labor and/or material.*

> H. Graham, *Handbook of Federal Evidence* §§611.3, 611.13 (2d ed. 1986)' 29 Am.Jur.2d *Evidence* §§ 251, 269 (1967). Here, the purpose of Dr. Watkins' testimony was to rebut Mr. Knight's testimony, not to rehash Dr. Watkins' previous testimony. Randle's initial questions, while covering some of the same material, were intended to provide the basis, and otherwise set the stage, for Dr. Watkins' rebuttal.

Evidence which Aspen anticipated to obtain from Fred Nash clearly constituted rebuttal testimony that should have been allowed, particularly in light of the trial court's prior rulings which denied the Defendant's Motion in Limine and then allowed Ken Whipple to testify as an HVAC expert and that the heating system was not defective. (See Transcript 852.) Having allowed the "waters to be muddied," Aspen should have been allowed to introduce Fred Nash's testimony as rebuttal evidence, if only to rebut the surprise testimony of Ken Whipple.

The ruling excluding Nash's testimony along with the trial court's rulings concerning the Scheduling Order and then allowing Ken Whipple's testimony as an HVAC expert as discussed above denied Aspen the opportunity to fairly and effectively present its case. Aspen respectfully submits the cumulative effect of the trial court's evidentiary rulings denied it a fair trial.

CONCLUSION

The appellate courts are entrusted with the responsibility of ensuring legal accuracy and uniformity of the laws of this state.

The trial court's pretrial ruling allowing Whipple Plumbing to pursue and obtain "equitable recovery" for the HVAC - furnace work, which Whipple was not licensed to perform, was error. The trial court compounded this error when it entered Conclusion of Law No. 5 and granted Whipple an order of foreclosure inclusive of the HVAC work,

notwithstanding Judge Brian's pretrial order which expressly dismissed the HVAC - furnace mechanics' lien claim.

It was error for the trial court to grant Whipple Plumbing's Motion to Reopen on the grounds of "in the interests of justice." The evidence before the trial court did not support the trial court's factual or legal conclusions that the Plaintiff had met its burden of proving compliance with the statutory requirements of a mechanics' lien foreclosure action. Even assuming for argument's sake the order allowing the Plaintiff Whipple to reopen was not error, the evidentiary basis of compliance with the statutory elements was inadequate.

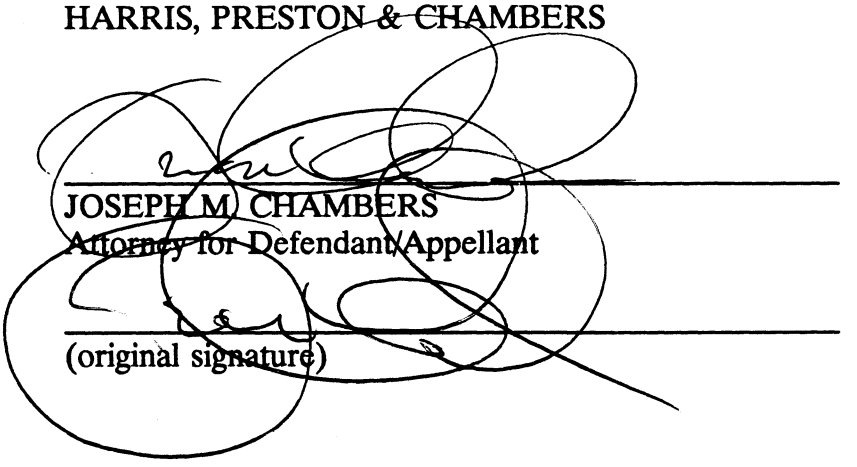
The evidentiary basis to support the trial court's award of $3,200.00 for the sewer laterals and $7,500.00 attorney fees is insufficient as a matter of law and requires reversal.

The trial court erred in not granting Aspen's pretrial Motion to Dismiss and Motion in Limine where the Plaintiff failed to timely comply with the trial court's Scheduling Order and the Utah Rules of Procedure regarding discovery. It compounded this error when it allowed Ken Whipple to testify at trial as an HVAC expert witness when the Plaintiff never disclosed that Ken Whipple would be called as such and further compounded this error when it refused to allow testimony of Aspen's mechanical engineer Fred Nash in rebuttal to Ken Whipple's surprise HVAC expert testimony.

The Court of Appeals should reverse and remand the case with instructions to vacate the order of foreclosure, the award of attorney fees to Whipple and also order such other relief as this court finds appropriate, including but not limited to the award of Aspen's reasonable attorney fees incurred in defending the mechanics' lien claims (the HVAC and plumbing) at trial as well as for this appeal.

Respectfully submitted this 21 day of April, 1998.

HARRIS, PRESTON & CHAMBERS



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CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT AND ADDENDUM were mailed, postpaid, to the following this 21 day of April, 1998:

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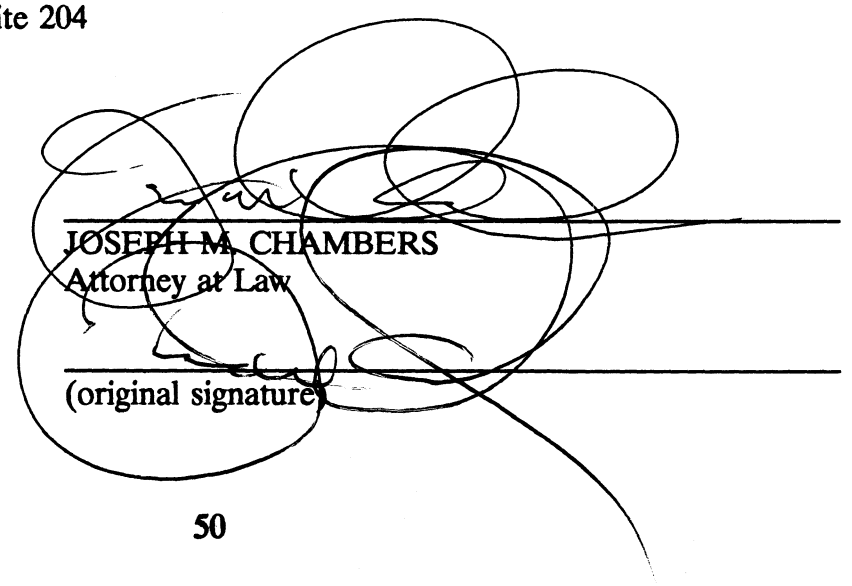

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